Submission to the National Classification Review

Discussion Paper 77: Review of Censorship and Classification

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INTRODUCTION

I would firstly like to thank the ALRC for the continued opportunity to participate in this process by responding to the discussion paper (DP77). However, I must also state at the outset of this submission that I feel that the ALRC has been granted neither sufficient time nor resources to explore and develop proposals regarding such a complex and contentious area of legislation as media classification and censorship. Consider that, at the close of the submissions period for DP 77, the ALRC will have little more than three months to take into consideration any feedback and modify their proposals accordingly. Three months is hardly enough time to do this, and it is certainly insufficient time to develop new proposals based on said feedback, or have any alterations/additions be subject to another consultation period. A rushed review does no one favors.

The compressed timescale, I believe, is also reflected within the seemingly artificially limited scope of DP77 and, outside of Issues Paper 40 (IP40) and DP77, its focus on consultation with industry and lobby groups to the exclusion of the public[1]. Of the myriad of issues associated with media classification, censorship and regulation within Australia, the ALRC has elected to focus only on what it has termed as the 'architecture' of the new scheme[2], leading to a slate of proposals that do little more than change the process through which the current outcomes, condemned as undesirable by both those desiring more and less media regulation, are achieved. *None* of the proposals represents a significant (intentional) change, much less a significant *positive* change, to the way in which Australians relate to and interact with media as consumers and non-commercial entities, though they do alter the way in which *commercial* entities, particularly large commercial entities, interact with the government in what appear to be largely beneficial ways.

Changes that are on offer to 'ordinary' Australians and non-commercial content producers are far from the fundamental reform the Review acknowledges as both desired and necessary. They are largely little more than tweaks (proposals 8.3 & 9.3), affirmations of sometimes unworkable ideas carried over from the existing framework (proposals 8.4 & 10.1), result (seemingly inadvertently) in far greater restrictions being placed on content access (proposals 6.4, 6.5 & 9.1), or are rather cynically designed to facilitate the implementation of highly contentious government policy with less fuss (proposal 10-1). Worryingly, there is at least one proposal (6-4) that argues for the creation of what the Review itself openly acknowledges as an unenforceable law *simply for the look of the thing.* Coming from Australia's premiere law reform body, such a proposal is not just worrying but *shocking*.

It is also deeply worrying that a review whose very existence was sparked initially by concerns over excessive government censorship completely fails to address those concerns and, indeed, actively absolves itself of responsibility to do so, presumably due to the aforementioned time restrictions. Indeed, the ALRC is oddly reluctant to issue recommendations on the nitty-gritty of classification and censorship, refusing, by and large, to make any recommendations on the actual classification criteria

[1] As detailed in Appendix 1 of DP77, while the Review has consulted extensively with industry groups, lobbyists, lawyers, government officials, religious representatives and academics, it has not sought input, beyond write-in submissions, from individuals unaffiliated members of the public and has engaged with them in a very minimal way. Moreover, while the Review sought input from as far afield as China and the United States, there were *no* consultations held in Western Australia, the Northern Territory or Tasmania.

[2] http://www.alrc.gov.au/public-forum/classification-forum/4-international-classification-systems#comment-243

for content, while, bizarrely, simultaneously proposing classification categories based on those, at worst, non-existent and, at best, unsettled criteria. This is despite both the aforementioned historical motive for the review and the very directives given to it which requires it to (emphasis added):

- "consider the extent to which the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), state and territory enforcement legislation, schs 5 and 7 of the *Broadcasting Services Act 1992* (Cth), and the Intergovernmental Agreement on Censorship and related laws continue to provide an effective framework for the classification of media content in Australia" (DP77 1.2)
- Consider "the classification categories contained in the Classification Act, National Classification Code and Classification Guidelines" (DP77 1.3 item 3)
- Have regard to "the need to improve classification information available to the community and enhance public understanding of the content that is regulated" (DP77 1.4)

Finally, I wish to comprehensively endorse the submission of Irene Graham to DP77 (submission #2507[3]). She has examined, in detail, many problems with the proposed framework that I have not touched on, or touched on only lightly, due to time constraints.

On Classification Architecture

In my professional capacity as a librarian, I am also concerned by the review's approach to the construction of the new classification framework itself – the so-called 'architecture' of the system. It appears that there is a belief within the ALRC that the classifying framework can be considered and developed independent of an examination of the very content it seeks to define and regulate. The presumption of the Review is that the content and classification criteria will be examined and derived later, by others, and these criteria will be made to fit the framework they have developed. This approach is, frankly, the inverse of best practice, and will ultimately result in a deeply flawed and potentially non-functional framework.

Creation of a new, formal classification scheme starts with a consideration of the purpose of the scheme. The review has largely completed this portion of the process, determining that its purpose is primarily to provide consumer information rather than restrict access, and detailing eight guiding principles on which to build the framework. The next stage of framework construction, however, is an examination of the content to be classified, with the goal of determining what its properties are and, *from that*, how best to describe and/or group the content together in service of the purpose of the scheme – the creation of taxonomy and criteria for the taxa. This step has not been taken. Instead, the review has more or less ignored any detailed examination of content in order to develop criteria, and is proposing applying the old classification groupings more or less wholesale without considering if they:

a) effectively and correctly describe the content they currently contain

b) will effectively and correctly describe content in the future

c) fulfil the purpose of the scheme

[3] http://www.alrc.gov.au/sites/default/files/pdfs/ci_2507_i_graham.pdf

The answer to all three questions, incidentally, is 'no'.

Only when the purpose of the scheme has been defined, the content examined and criteria set can the rest of the framework be constructed. This is because the decisions made in those first few steps irrevocably define the very shape of the framework, and the rules under which it will operate moving forward. Getting the framework *right* is vitally important; given the rarity with which reviews of the framework are conducted, whatever legislation based on this review eventually makes its way through parliament will have to serve the Australia for at least a decade without significant alteration.

I will highlight some of the problems the chosen top-down approach has already engendered in my discussion of proposal 9-1.

On Censorship

Following the response to IP40, the Review determined that the prime guiding principle behind media classification in Australia should be that "Australians should be able to read, hear, see and participate in media of their choice". However, it has failed to support this assertion in any way, shape or form with concrete recommendations or proposals, and has shied away from using the guideline as intended: a test against which all aspects of the new scheme should be judged. Indeed, several of the proposals listed in DP77 do not appear to have been subject to a robust test against *any* of the guiding principles.

The Review has also acknowledged that the existing framework is rooted in the outdated idea that its purpose is to censor rather than inform. By extension, it acknowledges that the primary purpose of the new framework is classification rather than censorship. But, again, the Review fails to support this acknowledgement with concrete recommendations or proposals for reform. Indeed, when the opportunity to do so is obvious – particularly with regards to X18+ and RC categories of content – the Review actively absolves itself of responsibility to consider the issue.

Finally, the Review, in the creation of the proposed new, unified, framework, is also likely to remove one of the few barriers that prevent censorship within Australia from becoming still more onerous. Civil Liberties Australia, in their submission to Issues Paper 44, noted that ineffectiveness of the current cooperative scheme has been both a blessing and a curse[4]: while it has consistently resisted attempts at liberal reforms like the introduction of an R18+ rating, it has also stymied – or attempted to stymie – attempts to further increase the level of censorship. Lacking even this limited and two-faced protection, Australians will find themselves at the mercy of governments who have virtually no restrictions on their ability to censor their citizens. The Review has not addressed this issue, and has proposed no new checks and balances on the exercise of government power in the censorship arena.

The Review contends that issues of censorship and legality are issues for politicians. The problem is that the politicians, by calling the review in the manner and for the purposes in which they have called it, have declared that it is, in fact, a matter for the ALRC. And this is for the best: questions of

[4] http://www.alrc.gov.au/sites/default/files/pdfs/ci_1143a_civil_liberties_australia_.pdf

censorship are questions about the application and extent of government power, and governments are in a poor position to consider them objectively.

If the Australian Law Reform Commission, our country's premiere and most respected law reform body, is unwilling to comprehensively address the issues surrounding censorship in Australia within a review where the Terms of Reference are entitled 'Review of Censorship and Classification', and where they are *explicitly required by those terms of reference to consider any relevant constitutional issues*, then I would contend that it is highly unlikely that the issue will ever be addressed, much less in a comprehensive fashion. It has, after all, gone comprehensively unaddressed for more than twenty years to date.

5. THE PROPOSED CLASSIFICATION SCHEME

PROPOSAL 5–1

A new National Classification Scheme should be enacted regulating the classification of media content.

While the current framework is outdated and ineffective, it is actually less impactful and poses fewer restrictions on 'ordinary Australians' than the scheme effectively proposed in DP77. I therefore cannot support a new Classification Scheme based on the proposals in DP77 unless it undergoes substantial revision.

PROPOSAL 5–2

The National Classification Scheme should be based on a new Classification of Media Content Act. The Act should provide, among other things, for:

a) what types of media content may, or must be classified;
b) who should classify different types of media content;
c) a single set of statutory classification categories and criteria applicable to all media content;
d) access restrictions on adult content;
e) the development and operation of industry classification codes consistent with the statutory classification criteria; and
f) the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws.

As with 5-1. However, if such a scheme is enacted, it must also provide a clear purpose for both classification and censorship, in keeping with Guiding Principle 7, and provide limits to its application.

PROPOSAL 5–3

The Classification of Media Content Act should provide for the establishment of a single agency ('the Regulator') responsible for the regulation of media content under the new National Classification Scheme.

As with 5-1. However, if such a scheme is enacted, the Regulator must be established as a body independent of government.

PROPOSAL 5–4

The Classification of Media Content Act should contain a definition of 'media content' and 'media content provider'. The definitions should be platform-neutral and apply to online and offline content and to television content.

I have some concern that a workable and meaningful definition will be found for 'media content provider', given that the 'content provider', particularly for online content, may in fact be a group of numerous otherwise unrelated individuals, organizations or companies. Who is the media content provider for a post on a website? The original author? The hosting website? The hosting website's content host? The five mirror sites and their hosts? The search engine that automatically creates a cached copy of the page and provide a preview of the content when the user mouses over the referral link? The Internet Archive who archives a copy of the page?

Who is the content provider when content is taken from one source and embedded in another? How will the definitions apply to torrenting technology and other distributed content sharing platforms? If a file distributed via bit torrent has 500 seeders and 1000 leechers, are all 1500 users media content providers? What of cloud-based services? If I buy and download a game from a service like Steam, are they the content provider or is it the owner(s) of the regional download server? Both? The sale was conducted though Steam and the game accessible via my steam account, but the game itself was downloaded from another company, and a third, the original content creator, then provided the patch needed to make it function properly.

This definition must be extremely well crafted with these sorts of considerations in mind, else they will be too broad to have any real use. Using such a broad definition as a basis for regulation could easily result in the prosecution of individuals and entities that have no power to take action regarding the content they supposedly 'own'. As a content author, for example, I may be entirely unable to have content that I provided to a website altered, restricted or removed. As a content host, I may be able to do nothing about the Google cache of the page.

6. WHAT CONTENT SHOULD BE CLASSIFIED?

PROPOSAL 6–1

The Classification of Media Content Act should provide that feature-length films and television programs produced on a commercial basis must be classified before they are sold, hired, screened or distributed in Australia. The Act should provide examples of this content. Some content will be exempt: see Proposal 6–3.

Clear definitions need to be provided for the following terms:

- feature-length films
- television programs

- commercial basis

Defining 'commercial basis' is particularly important; if I fund the upkeep of my website by allowing advertising to appear on it, and host my video there, am I a commercial operator? What if I have no control over whether or not advertising appears on my site? What if I do not make revenue from the video, but the content host does? By uploading it to Youtube, does it become a commercial production, given that Google sells advertising against it? What if a clearly commercial entity uses a program like Youtube's Content ID program to make money off of my otherwise non-commercial work[5]? How does it work if I produce it and screen it on a non-commercial basis, and then release it on a commercial basis? Does it now require classification? Why? It was being screened quite happily before without classification.

PROPOSAL 6–2

The Classification of Media Content Act should provide that computer games produced on a commercial basis, that are likely to be classified MA 15+ or higher, must be classified before they are sold, hired, screened or distributed in Australia. Some content will be exempt: see Proposal 6–3.

There is an immediate question that begs answering: why treat computer games uniquely in the new framework? Currently, the Review is proposing one set of rules for film and television, one set of rules for games and one set of rules for everything else. The reason given for this exception ("[MA15+ games] are the games that parents and guardians arguably most need to be warned about—the games with strong or high levels of violence, coarse language and other content." DP77 6.61) essentially seems to be saying that computer games are somehow uniquely harmful. This is in defiance of the evidence base, a recent government inquiry supporting that evidence[6] and the ideal of platform neutrality espoused by DP77. The proposal therefore runs contrary to one of the ALRC's fundamental informing principles - that recommendations need to be grounded in evidence (DP77 1.19) – and also means that it would fail a test against Guiding Principle 8: "classification regulation should be focused upon content rather than platform or means of delivery" (DP77 4.2).

Furthermore, as Lin points out in their submission to DP77[7], it is also odd in light of the fact that, as proposed, there is not really any way or reason to penalize content providers who don't classify content likely to be MA15+. If the framework:

a) requires content to be classified before the Regulator or other authority can take action, as I propose in my response to 6-6 and;
b) only requires content R18+ or greater to be restricted to adults

[5] www.youtube.com/t/contentid

[6] http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Literature+Review+-+VVGs+and+Aggression+-+November+2010.DOC/$file/Literature+Review+-+VVGs+and+Aggression+-+November+2010.DOC

[7] http://www.alrc.gov.au/sites/default/files/pdfs/ci_2476_lin.pdf

then the act of the querying the lack of rating on a game that is or is likely to be MA15+ rates results in the content becoming rated and legal to distribute.

Games should be either treated as feature-length films/television, which in 6-1 the Review proposes requiring classification at all levels, or should be treated in a way that is consistent with the handling of other media: only requiring classification at the highest content levels. Given that increasing numbers of games are distributed purely digitally and that the current framework has demonstrated that is utterly unable to cope with this rise, treating games as content identified in 6-1 would pose too high a burden on both regulator and industry, and would lead to widespread non-compliance. Games should therefore be treated as other content.

PROPOSAL 6-3

The Classification of Media Content Act should provide a definition of 'exempt content' that captures all media content that is exempt from the laws relating to what must be classified (Proposals 6–1 and 6–2). The definition of exempt content should capture the traditional exemptions, such as for news and current affairs programs. The definition should also provide that films and computer games shown at film festivals, art galleries and other cultural institutions are exempt. This content should not be exempt from the proposed law that provides that all content likely to be R 18+ must be restricted to adults: see Proposal 8–1.

The implication that news media and current affairs programs are not exempt from requirements to restrict access to content that is 'likely to be R18+' is unreasonable. A live news broadcast cannot be guaranteed to be free of material 'likely to be R18+'; placing this requirement on them would have a negative impact on the ability of Australian news media services to broadcast from warzones, riots and other areas of unrest and violence. It would also hamper their ability to report on such matters using pre-recorded footage or images. In June 2009, numerous Australian media services screened footage of the shooting death of a young Iranian woman. The footage was graphic, shocking, and *iconic*. It was also later classified as Prohibited[8], meaning that, yes, it is likely to have been classified R18+. More recently, footage has been broadcast of scenes of violence from the dispersal of Occupy Wall Street protestors.

A blanket exemption should apply to art galleries, museums, libraries and other cultural institutions. There is no evidence to suggest that their current modes of operation are insufficient. Exemptions should also be provided, where reasonable, for entities providing access to media for a) the visually and/or aurally impaired and b) Australians who do not speak English or speak English as a second language. If these exemptions are not granted, such groups seeking classification should be provided either with free classification training or an exemption from classification fees. In the event such exemptions are granted, however, the Review should consider the appropriateness of imposing on them the access restriction requirement – if they are not expected to classify media, how are they expected to be able to tell if media is 'likely to be R18+'?

[8] http://www.orzeszek.org/blog/2009/08/28/acma-blacklists-iran-protest-video-boing-boing/

PROPOSAL 6–4

If the Australian Government determines that X 18+ content should be legal in all states and territories, the Classification of Media Content Act should provide that media content that is likely to be classified X 18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia.

Firstly, I would be interested to read, in some detail, why the Review does not feel that it should be advising the government with regards to the legality or illegality of content currently and proposed to be in this category, particularly given that it fails the test against Guiding Principle 1: "Australians should be able to read, hear, see and participate in media of their choice". This reluctance is further puzzling given that the Review has an unambiguous mandate to review all areas of law associated with media classification and censorship, and is explicitly directed to examine (and presumably make recommendations regarding) the existing classification categories. An examination of the most fundamental distinction we make between media content for the purposes of regulation – legal and illegal – and therefore one of the foundational components of any media regulation framework is not simply desirable but *necessary*.

Of equal concern is that ALRC openly acknowledges that this proposal is unenforceable, but promotes it anyway as a means of "[making] clear Australia's standard on what may be acceptable to display in sexually explicit content" (6.73). It offers no evidence in support of this stance, nor of any benefit derived from it. This is a clear breach of the ALRC's own guiding principles:

- "(...)the need to ground recommendations in an evidence base " (DP77 1.19)
- "Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base." (DP77 1.20)

It is arguably also a breach of 24(2) *Australian Law Reform Commission Act 1996* (Cth), which states that "the ALRC must have regard to the effect that the recommendations may have on the costs of getting access to, and dispensing, justice "(DP77 1.17)

Unenforceable laws are bad laws. They reduce respect for government and rule of law. They can come to exist purely as 'gotcha' laws; that is, laws that are selectively applied to target particular individuals who may or may not be guilty of other offenses. And there is simply no worse piece of legislation than one where the thought processes behind its creation can be summarised as:

1. We need to be seen to be doing something
2. This is something
3. Let's do this

A further concern with using the idea of "[making] clear Australia's standard on what may be acceptable to display in sexually explicit content" is that the X18+ category is demonstrably <u>not</u> what Australia actually considers to be acceptable. It's far too limited, representing a steady chipping away of access rights by those who don't believe that sexually explicit content should be available at all. Australians, taken as a whole, actually have a fairly liberal approach to sexually explicit content, provided it is not violent, non-consensual or otherwise abusive, and have a tolerance for sexually

explicit imagery is higher than their tolerance for violent imagery[9]. The current X18+ category would have to be expanded quite extensively before it could be said honestly said to be reflective of what Australians consider acceptable.

As noted at 6.71, there "some might argue that if access to the content is restricted to adults, there is no need to have the content classified at all". I would, it seem, be one of those. What is the purpose of the X18+ category? The Review contends at 6.70 that it is to a) warn potential consumers that the content is sexually explicit and b) define the lower boundary of the RC category. If there is no requirement, at the 'lower', restricted-to-adults R18+ rating, to warn potential consumers that the material is very violent (which, as previously mentioned, is arguably of more concern to most Australians) or has other types of adult content, then there should be requirement to do so for explicit sexual material. If the Review proposes otherwise, it must present a clear evidence base for why the distinction is necessary. As for b), this is a reasoning that highlights the unaddressed problems within the RC category itself – that RC contains material that people don't realise is subject to higher restrictions. It is best solved by fixing the problems with the RC category i.e. making the RC category a category *only* for unambiguously illegal content, not for content that is legal-but-not-distributable.

If the Review persists with the notion that X18+ content must be classified, the volume of content is such that Industry are the only suitable classifiers.

PROPOSAL 6–5

The Classification of Media Content Act should provide that all media content that may be RC must be classified. This content must be classified by the Classification Board: see Proposal 7–1.

Again, the question must be asked as to why the Review refuses to provide guidance regarding the RC category, given that the primary historical driver for the review is concerns about the breadth and scope of the RC category, and that the Review itself acknowledges that there a great deal of concern about it.

In addition to that the problems discussed in 6-4, most of which apply to 6-5, this proposal appears to be impose a blanket requirement to classify **all** potentially RC material, regardless of source, use or distribution. The current –and therefore proposed – framework relegates, for example, a great many legal sexual acts to the RC category if captured on film; is it honestly the Review's intention to require ordinary Australians to have their 'home movies' classified? What about their diaries?

As many Australians are utterly unaware as to the breadth and extent of this category, it is not simply likely but *certain* that thousands of Australians will become inadvertent criminals, to say nothing of the utterly unprecedented violation of privacy this proposal represents. It is also a complete violation of the requirements of Sections 24(1) and 24(2) of the *Australian Law Reform Commission Act 1996*.

Another unintended consequence lies in the failure include even a mention of a grandfather clause. In its present form, this proposal would require, not just Australian citizens, but large-scale media

[9] http://www.thepornreportbook.com/uploads/files/Albury_report_summary.pdf

repositories such as libraries and archives to a) assess their collections to determine if any content may be RC and then b) submit it to be classified. Given that the National Librarian of Australia alone holds over three million monographs, and again that number of media on other formats[10], the burden of compliance would be completely unreasonable, if not simply impossible, again violating the requirements of the proposed Act. What about university libraries who provide access to millions of scholarly articles via subscription database services? There are assuredly articles written in certain fields of study – criminology, forensic science, psychology, political science – that discuss, in detail, matters that would fall foul of the current definitions of RC.

PROPOSAL 6–6

The Classification of Media Content Act should provide that the Regulator or other law enforcement body must apply for the classification of media content that is likely to be RC before:

a) charging a person with an offence under the new Act that relates to dealing with content that is likely to be RC;
b) issuing a person a notice under the new Act requiring the person to stop distributing the content, for example by taking it down from the internet; or
c) adding content to the RC Content List (a list of content that the Australian Government proposes must be filtered by internet service providers).

The Proposed Classification of Media Content Act should provide that the Regulator or other law enforcement bodies must apply for classification before taking **any** action with regards to **any** content, not just that which could be considered RC. Neither the Regulator nor other agencies should act on the basis of an 'I think' or a 'maybe' when there is a dedicated mechanism for determining if that 'maybe' is, in fact, an 'is' or 'isn't'.

Secondly, a potential problem may arise, as noted in my response to 5-4, that notice may be issued to a person who is, in effect, powerless to stop the distribution of content. This may be because they no longer have access to it, because they no longer have a right to it, because they released it under an irrevocable license, or any one of a hundred other scenarios.

Thirdly, it must be said that, while c) is a small step forwards with regards to the RC Content List, (if such a thing must exist and I would contend that it shouldn't), that there are a great many problems with it that have seemingly gone unconsidered by the Review. As Irene Graham notes in one of her responses to the ALRC Discussion forum question on Restricted Access Systems (RAS)[11], the list itself is immune from FOI requests and citizens are barred from seeing the classification decisions made regarding online content at every level, not just the RC category.

Given that, as would seem to be indicated by this question, the RC Content List seems destined to continue being part of the classification and censorship framework, its function and operation would merit examination by the Review in considerable detail. I must add, however, that this is a prime example of how the Review is importing, wholesale, ideas from the old framework without considering

[10] http://www.nla.gov.au/collections/statistics
[11] http://www.alrc.gov.au/public-forum/classification-forum/3-restricted-access-systems#comment-285

their suitability. Why is there a presumption that the RC Content List should exist within the new framework? Because it *might* be used as the basis for a proposed piece of highly contentious legislation?

PROPOSAL 6–7

The Classification of Media Content Act should provide that, if classified content is modified, the modified version shall be taken to be unclassified. The Act should define 'modify' to mean 'modifying content such that the modified content is likely to have a different classification from the original content'.

The Review must be clear on who would be responsible for ensuring that the modified version is classified. It's also worth noting that, again, the issue of jurisdiction arises, particularly for computer game mods. It's safe to say that the vast majority of such mods are produced and hosted overseas by individuals or small teams on a non-commercial basis. The likelihood of enforcing Australian regulation in this area is functionally nil. Then, too, there is the issue of user-generated content; who is the responsible party if someone leaves a comment on my blog that might change the classification? What if they're not Australian but I am? Does it matter if my website is hosted overseas?

7. WHO SHOULD CLASSIFY CONTENT?

PROPOSAL 7–1

The Classification of Media Content Act should provide that the following content must be classified by the Classification Board:

a) feature-length films produced on a commercial basis and for cinema release;
b) computer games produced on a commercial basis and likely to be classified MA 15+ or higher;
c) content that may be RC; *Proposals and Questions* 11 (d) content that needs to be classified for the purpose of enforcing classification laws; and
d) content submitted for classification by the Minister, the Regulator or another government agency.

I've by and large expressed my concerns regarding a-c. With d), however, the Review has not provided any rationale as to why the Minister (who is also undefined) should have the power to trigger a review.

QUESTION 7–1

Should the Classification of Media Content Act provide that all media content likely to be X 18+ may be classified by either the Classification Board or an authorised industry classifier? In Chapter 6, the ALRC proposes that all content likely to be X 18+ must be classified.

No.

Please note first that this statement is not actually consistent with what has been proposed in Chapter 6. Proposal 6-4 refers only to X18+ content that is going to be "sold, hired, screened or distributed". Question 7-1 is asking if **all** content that might be X18+ must be classified, regardless of its intended and actual use or distribution status. The distinction is an important one. This question is unreasonable for the reasons laid out in my response to proposal 6-5 and is, in fact, still more onerous and a greater privacy violation.

In the event that the Review means, in this question, only material that is "sold, hired, screened or distributed", then the answer again is 'no'. The Review has not provided evidence for why sexually explicit material can't be accommodated under the proposed R18+ rating, restricted to adults. And, if non sexually-explicit adult content is not required to be classified save in the particular circumstances outlined in 6-2, there is no reason why sexually explicit adult content should be.

QUESTION 7–2

Should classification training be provided only by the Regulator, or should it become a part of the Australian Qualifications Framework? If the latter, what may be the best roles for the Board, higher education institutions, and private providers, and who may be best placed to accredit and audit such courses?

The idea of bringing training in media classification under the umbrella of the the Australian Qualifications Framework is an excellent one.

PROPOSAL 7–6

The Classification of Media Content Act should provide that the functions and powers of the Classification Board include:

a) reviewing industry and Board classification decisions; and
b) auditing industry classification decisions.

This means the Classification Review Board would cease to operate.

Having the Classification Board review its own decisions creates a potentially problematic conflict of interest. The current state of affairs, however, with the Classification Review Board, is problematic in other ways, most of which are detailed in the Discussion Paper (thought it does neglect to mention the often unrepresentative makeup of it). On the balance, however, the current situation is preferable.

Perhaps, instead, there is an opportunity to make the role of an independent Review Board full time, which would reduce both the comparative expense and solve the problem of limited experience. They might be re-purposed as general auditors, reviewing Board and industry decisions on a regular

basis even without the prompt of an external request for review and providing guidance and instruction.

8. Markings, Advertising, Display and Restricting Access

Proposal 8–1

The Classification of Media Content Act should provide that access to all media content that is likely to be R 18+ must be restricted to adults.

See 8-2

Proposal 8–2

The Classification of Media Content Act should provide that access to all media content that has been classified R 18+ or X 18+ must be restricted to adults.

While a potentially desirable goal in theory and potentially achievable in physical retail spaces, in practice this will not be possible for online content. There is simply too much of it, and too much of it hosted in countries that simply don't care about Australian content standards – if they're even aware that they exist. It may also inadvertently criminalize non-commercial content providers and ordinary Australians who aren't experts on media classification and can't be expected to consistently determine 'what is likely' to be R18+. I consider myself to have an above-average understanding of the classification framework and current classification criteria, but I would struggle to determine if content was likely to be R18+ without the relevant classification guidelines on my lap and the advice of someone who can clearly explain what currently distinguishes 'high' from 'strong' or how 'impact' is defined.

With regards to the idea of the 'restrict or classify notice'; as Irene Graham noted in the online discussion of Restricted Access Systems (RAS), the proposed notice will, in many cases, be treated as a 'restrict, classify or remove' notice[12]. As I subsequently noted, this would, in turn, be a violation of proposal 6-6, which requires that the Regulator or other enforcement agencies must have content classified before taking action to have it removed [13]. The introduction of such notices would also see the creation of another grey area of content, material that is not actually R18+ but is treated and restricted as though it is by content providers who have an RAS in place but can't afford – or can't be bothered – to classify it. Indeed, if there are, as proposed in section 14, offenses tied to the failure to correctly determine if content is adult or not, most content publishers who are not classification experts could reasonably be expected to consistently err on the side of restriction.

[12] http://www.alrc.gov.au/public-forum/classification-forum/3-restricted-access-systems#comment-220
[13] http://www.alrc.gov.au/public-forum/classification-forum/3-restricted-access-systems#comment-221

PROPOSAL 8–3

The Classification of Media Content Act should not provide for mandatory access restrictions on media content classified MA 15+ or likely to be classified MA 15+.

This is a sensible and welcome change, particularly when coupled with the repurposing of the M15+ classification.

QUESTION 8–1

Should Australian content providers—particularly broadcast television—continue to be subject to time-zone restrictions that prohibit screening certain media content at particular times of the day? For example, should free-to-air television continue to be prohibited from broadcasting MA 15+ content before 9pm?

No – it is a requirement increasingly made anachronistic by the uptake of time-shifting devices and devices with inbuilt parental controls. However, phasing out of this requirement should be done gradually and coincide with the phasing out of analogue broadcasting services.

9. CLASSIFICATION CATEGORIES AND CRITERIA

PROPOSAL 9–1

The Classification of Media Content Act should provide that one set of classification categories applies to all classified media content as follows: C, G, PG 8+, T 13+, MA 15+, R 18+, X 18+ and RC. Each item of media content classified under the proposed National Classification Scheme must be assigned one of these statutory classification categories.

What is the purpose of each of these categories? Why and how have they been chosen? How do they further the aims of the scheme? Have they been tested against and comply with its Guiding Principles?

If the ALRC is going to recommend the creation of classification categories applicable to all media, it should, at the very least, lay out what the purpose of each category is, how the criteria defining that category fulfill that purpose, how each category has been tested against the purpose of the scheme and its guiding principles, and provide examples as to how it is expected to operate. There is little to no evidence to suggest that this has been done. Instead, it appears that, on the whole, one aspect of the existing framework, intended to deal with specific types of media, has simply been dropped over all of the other types. The result is a flawed structure that seemingly inadvertently greatly increases the level of censorship Australians are subject to, and is thus one I cannot support.

AMALGAMATING FILM, PRINT AND GAME STANDARDS:

Even leaving aside the question of legality, I am deeply concerned about the Review's approach to the amalgamation of 'adult' content categories. I've elected to focus on the X18+ classification, as it is where the inconsistencies are most glaring:

In footnote 65, the Review notes (emphasis added):

> "Currently, it is illegal to sell X 18+ films in the Australian states, but not in most parts of the territories. It is not illegal, however, to sell magazines classified Category 1 Restricted or Category 2 Restricted (the publications classifications equivalent to the X 18+ film classification)."

This statement alone demonstrates a disturbing failure of the Review to appreciate the differences between the existing classification frameworks, and frankly leads me to wonder if the Review has, despite what is otherwise indicated in DP77, only seriously considered certain pornographic serial publications when approaching this category.

Category 1 and Category 2 (C1&C2) publications are not an easy equivalent of the film X18+ rating. Nor are they an easy equivalent of R18+ or RC ratings for film. Some of the material that is allowable as a C1 or C2, which may be legally sold in most parts of Australia, would be classified RC if they were treated under the current criteria for film. Other content would be R18+. Consider *American Pyscho*, as mentioned at 9.31 as an example of how publications might be handled. The book, which is a C1 monograph, is notable for its graphic depictions of violence, including sexual violence, and could not be accommodated the X18+ rating without the X18+ rating criteria being substantially changed. It is, however, uncertain if, as the Review suggest at 9.31, if it would be able to sustain an R18+rating under the current (and therefore proposed) criteria without significant edits; given that the film of the book, which leaves out some of the most potentially contentious content, is already subject to an R18+ rating, I consider it unlikely.

If the move to lump all publications in under the film rating scheme without changing the current criteria proceeds, the following will happen to Category 1 and Category 2 publications:

- SomeC2 publications will become X18+. As the Review has declined to provide any recommendations regarding decriminalizing the sale of X18+ works, these publications will effectively become banned outside of the Territories.
- Some C1 publications will become R18+. They will no longer need to be classified.
- Some C1 & C2 publications will become RC. They will effectively become banned throughout Australia.

Table 1 on the next pages, which compares key criteria in the X18+, C1 & C2 ratings, should succinctly illustrate why the above will happen.

TABLE 1: KEY CLASSIFICATION CRITERIA FOR X18+ FILM VS CATEGORY 1 & CATEGORY 2 PUBLICATIONS

	X18+ (Film)	Category 1 (Publications)	Category 2 (Publications)

Violence	No depiction of violence, sexual violence, sexualised violence or coercion	• Publications which promote, incite or instruct in violence are not permitted.
		• The treatment of realistic violence may be detailed. Descriptions and depictions of violence that are excessive are not permitted.
		• Descriptions and depictions of violence in a sexual context should not be exploitative.
		• Descriptions and depictions of sexual violence should not be detailed. They should not be:
		  ○ gratuitous; or
		  ○ exploitative.
		• Gratuitous, exploitative or offensive depictions of cruelty or real violence will not be permitted.
			• Publications which promote, incite or instruct in violence are not permitted.
			• The treatment of realistic violence may be detailed. Descriptions and depictions of violence that are excessive are not permitted.
			• Descriptions and depictions of violence in a sexual context should not be exploitative.
			• Descriptions and depictions of sexual violence should not be detailed. They should not be:
			  ○ gratuitous; or
			  ○ exploitative.
			• Gratuitous, exploitative or offensive depictions of cruelty or real violence will not be permitted.

Language	No sexually assaultive language	Virtually no restrictions	Virtually no restrictions
Sex	Real depictions of actual sexual intercourse and other sexual activity between consenting adults	• Detailed descriptions of sexual activity involving consenting adults may be permitted. However sexual themes with a very high degree of intensity should not be described. • Actual sexual activity may not be shown in realistic depictions. Simulated or obscured sexual activity involving consenting adults may be shown in realistic depictions. Genital contact is	• Detailed descriptions of sexual activity involving consenting adults may be permitted. • Actual sexual activity involving consenting adults may be realistically depicted.

	X18+ (Film)	Category 1 (Publications)	Category 2 (Publications)
		not permitted to be shown in realistic depictions. • Stylised depictions of sexual activity involving consenting adults may be more detailed than realistic depictions.	
Fetishes	Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are not permitted	• Descriptions and depictions of fetishes should not be exploitative. Descriptions and depictions of fetishes in which non-consent or physical harm are apparent are not permitted. Descriptions and depictions of *revolting and abhorrent phenomena* are not permitted. • Descriptions of fetishes may contain detail. • Depictions of mild fetishes may be permitted. • Depictions of stronger fetishes are not permitted.	• Descriptions and depictions of stronger fetishes may be permitted. • Descriptions and depictions of fetishes in which non-consent or physical harm are apparent are not permitted. • Depictions of *revolting and abhorrent phenomena* may be permitted. Stylised depictions and written descriptions may be more detailed than realistic depictions.

In effect, this proposal will, in a single stroke, criminalize the distribution and, in some cases, ownership of material that is currently lawfully sold and owned. This is, once again, fails a test against the first guiding principle while doing nothing to support the other seven. It, again, is a violation of the principles on which the ALRC operates. It is a violation of Section 24(1) and 24(2) of the Act. It will not only drastically curtail the variety of media Australians have access to, but will drive business reliant on this content either out of business or out of Australia, and will not further the purpose of the scheme while doing so.

Some, I know, would applaud this result. I, however, cannot.

The issues with the proposal regarding the X18+ does, however, serve to highlight the problem with the top-down approach that the Review is taking to the construction of the framework. Having selected its categories and set criteria without first examining the content it has created a situation where, if implemented as intended, the framework would not *work* as intended. Content that is expected to be classified in one way will end up being classified in another, unsatisfactory way. It's as if I built a machine to sort marbles by colour, only to find, once I turned it on, in that I'd forgotten to designate red as a colour and that some of the green marbles are too big to fit into the sorter. But by that stage it's far too late to change the way the machine is set up, so the red marbles end up in with the orange because that's the closes to red, and the big green ones periodically get jammed in the machine meaning I have to manually sort them, or go sproing off into dark corners and don't get sorted at all.

It is an inelegant metaphor, perhaps, but hopefully illustrates the point.

PROPOSAL 9–2

The Classification of Media Content Act should provide for a C classification that may be used for media content classified under the scheme. The criteria for the C classification should incorporate the current G criteria, but also provide that C content must be made specifically for children.

For this category to be effective, the Review must define what 'child' means for the purposes of the category. The definition of 'child' varies wildly nationally and depending on the legislative tool in use. In the ACT's *Children and Young People Act 2008*, a child is a person under the age of 12[14]. In New South Wales, under the *Children and Young Persons (Care and Protection) Act 1998*, it's a person under the age of 16[15]. By the *Children and Community Services Act 2004*, a child in Western Australia is someone who is or, in the absence of documentary evidence, is *apparently* under the age of 18[16]. On the other hand, the States and Territories (with the exception of Queensland) consider anyone under the age of 18 as children or juveniles within the confines of the criminal justice system[17]. If we look explicitly to current legislation regarding media classification, there's the

[14] http://www.legislation.act.gov.au/a/2008-19/current/pdf/2008-19.pdf
[15] http://www.legislation.nsw.gov.au/inforcepdf/1998-157.pdf?id=e1d4629c-fe8a-49fb-c05e-e9d24d1c6d56
[16] http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:21050P/$FILE/ChildnAndCommtServAct2004_03-a0-00.pdf?OpenElement
[17] http://www.aic.gov.au/crime_community/demographicgroup/youngpeople/definition.aspx

Commonwealth *Criminal Code Act 1995*, where the de definition of child for the purposes of policing child abuse material is anyone who is, appears or is implied to be under 18[18]. On the other hand, it is doubtful that most Australians would think of someone who is a day shy of 18 when they think of 'child'.

I also question the *need* for a 'C' category. Will it be sufficiently well-delimited from the 'G' category that it won't, in practice, be treated as a 'G' rating (or vice versa), and, in a few years, cause a confusion similar to that over the M15+/MA15+ film and games categories?

PROPOSAL 9–3

The Classification of Media Content Act should provide that all content that must be classified, other than content classified C, G or RC, must also be accompanied by consumer advice.

While the Review contends that "consumer advice is unnecessary for RC content, because the content is illegal to sell" (DP77 9.39), it neglects to mention that fact that a great deal of content eligible for this classification, both currently and proposed, is not and will not be illegal to own or view. It is also possible for Australians to quite legally come to own content that has been Refused Classification. The rating may be applied retrospectively to content, as aptly demonstrated by the see-saw ratings of the film *Salo* or post-release classification of *Grand Theft Auto III*[19], or the content may have been purchased before it was assessed as being RC, if only because no-one involved with its production or distribution realised that it 'might be' RC' . Given the breadth of material that the rating covers and how poorly it is understood, this is not an unlikely scenario.

If the Board rates RC content and the content itself is not illegal, then the Board should release a content advisory.

PROPOSAL 9–4

The Classification of Media Content Act should provide for one set of statutory classification criteria and that classification decisions must be made applying these criteria.

See my response to 9-1.

PROPOSAL 9–5

A comprehensive review of community standards in Australia towards media content should be commissioned, combining both quantitative and qualitative methodologies, with a broad reach across the Australian community. This review should be undertaken at least every five years.

[18] http://www.comlaw.gov.au/Details/C2008C00035/Html/Text#param895
[19] http://www.zdnet.com.au/gta-3-offficially-banned-in-australia-120262360.htm

The Review has, thus far, failed to make a compelling case as to why a community standards-based approach is more desirable and effective basis for the construction of a new classification framework than other approaches, including a harm-based approach. Indeed, it does not appear to have objectively examined other approaches to media classification and regulation. Nor, despite noting them, has it actually addressed the concerns of critics such as myself, who consider the notion of legislation on the basis of something as contentious, nebulous and mutable as 'community standards' deeply problematic. Instead, the Review seems to feel that offering a periodic review of 'standards' will suffice to quell doubts.

It does not.

Regardless, if 'community standards' is going to be used as the basis for the framework, it must constantly be in a state of review. Five years is too long an interval. At the very least, there should be at least one review per three years. Also, will there be an obligation to act on the findings of the review? The results of previous, similar reviews have typically been ignored.

10. Refused Classification Category

Proposal 10–1

> The Classification of Media Content Act should provide that, if content is classified RC, the classification decision should state whether the content comprises real depictions of actual child sexual abuse or actual sexual violence. This content could be added to any blacklist of content that must be filtered at the internet service provider level.

This, frankly, seems to be an extraordinarily cynical proposal that exists only to allow the progression of a highly contentious piece of proposed government policy.

Firstly, what constitutes 'actual child sexual abuse' material? Presumably, the basis for this would be the Commonwealth *Criminal Code Act 1995*. However, the closest definition within the Act is 'child pornography material', which refers to depictions and descriptions of persons who are, appear to be or are implied to be under the age of 18. While this definition clearly captures abhorrent 'real' child sexual abuse material as intended, it also captures material which does not actually involve children at all, including cartoons, textual works or material where all involved parties are demonstrably over the age of eighteen. There is no legal distinction drawn between 'real' and 'fictional' abuse; to draw such a distinction would presumably require altering the *Criminal Code*. Complicating the matter, of course, is that some jurisdictions internationally, including the United States and Japan, *do* draw a distinction between the two.

Secondly, constitutes 'actual sexual violence'? Non-consensual sex? Presumably. But what about BDSM or other forms of rough – but entirely consensual – sex? How is violence itself defined?

Thirdly, the proposal, if intended as a transparency measure the government may use for its contentious filtering proposal, is useless, as it completely ignores the fact that classification decisions

regarding content submitted by ACMA for the 'blacklist' are not publically available. Indeed, they are not just unpublished, but *unpublishable*, immune even to FOI requests. The whole ACMA blacklist process is deliberately opaque, and Australians are not entitled to know what content has been classified and why. The only way Australians may know what content has been added to the blacklist and gain some inkling as to why is for the blacklist to be leaked.

Fourthly, I am concerned by the Review's decision to approach the matter of Refused Classification seemingly with a focus on ensuring that it plays nicely with the proposed mandatory internet filter. It begins with a presumption that the blacklist will exist as part of the new framework. Why? It provides no explanation nor evidence base for this, and certainly does not examine if its existence and operation will be in keeping with the purposes and guidelines of the new framework.

The approach also appears to have led the Review to misconstrue the statements of hundreds of Australians, myself included, that some material should remain criminalized as support for the ongoing existence of the category more or less as is (DP77 10.82), and its use as the basis for a mandatory filtering mechanism. In doing so, it has completely failed to either address concerns surrounding the category or offer a clear path forward for dealing with them. As it stands, nothing about the category will change, and it will still contain an awkward mixture of both legal and illegal material. A review into 'community standards' will be conducted, which will result in… what, exactly?

Finally, while the Review states that the "ALRC makes no comment about the merits or otherwise of such a filter" (DP77 10.80), a mere two paragraphs later it more or less calls for one to be implemented (emphasis added):

> "At the same time, very few submissions favoured the abolition of an RC category—most of those who considered the category to be too broad, as currently constituted, nonetheless were of the view that some material, particularly real depictions of actual child sexual abuse or actual sexual violence, is so contrary to both criminal law and community standards that it should be banned outright. In a convergent media environment, this necessitates the filtering of such content so that it is not accessible from personal electronic devices such as computers and mobile phones " (DP77 10.82)

Again, there is a lack of evidence to support this stance, or even to support the idea that filtering on such a broad scale is feasible, let alone a cost-effective solution to the perceived problem. It is discussed briefly at 8.34-8.40, but the Review declines to examine the arguments of both sides in any detail.

11. Codes and Co-regulation

Proposal 11–4

Where an industry classification code of practice relates to media content that must be classified or to which access must be restricted, the Regulator should have power to enforce compliance with the code against any participant in the relevant part of the media content industry.

This, again, raises the specter of the Regulator pursuing individuals and operators who have no power to act on any order. This issue must be addressed, particularly if there are, as proposed in section 14, criminal penalties for non-compliance.

13. Enacting the New National Classification Scheme

Proposal 13–1

The new Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia.

I cannot support the creation of a new Classification Act based on the framework laid out in DP77 in its present form.

14. Enforcing Classification Laws

Proposal 14–2

If the Australian Government determines that the states and territories should retain powers in relation to the enforcement of classification laws, a new intergovernmental agreement should be entered into under which the states and territories agree to enact legislation to provide for the enforcement of classification laws with respect to publications, films and computer games.

This is an undesirable outcome. However, if it comes to pass, the new agreement must be constructed carefully to avoid the problems inherent in the current scheme, including the unrepresentative and unaccountable nature of the decision-making body and development of extreme inconsistencies in the handling of media content.

PROPOSAL 14–3

The new Classification of Media Content Act should provide for offences relating to selling, screening, distributing or advertising unclassified material, and failing to comply with:

a) restrictions on the sale, screening, distribution and advertising of classified material;
b) statutory obligations to classify media content;
c) statutory obligations to restrict access to media content;
d) an industry-based classification code; and
e) directions of the Regulator.

See 14-4.

PROPOSAL 14–4

Offences under the new Classification of Media Content Act should be subject to criminal, civil and administrative penalties similar to those currently in place in relation to online and mobile content under sch 7 of the *Broadcasting Services Act 1992* (Cth).

Schedule 7 of the *Broadcasting Services Act* appear to be primarily focused on commercial operators, and the penalties reflect that, including daily fines of 100 penalty units, or around $11000[20]. This level of penalty would be unreasonable for non-commercial entities.

A clear distinction must be drawn between commercial operators, non-commercial operators and individuals for the purposes of any form of enforcement. Without formal training and advice, it is not always apparent when something 'might be R18+'. I don't believe that it's unreasonable to say that most individuals and non-commercial operators are likely to a) have limited understanding of their obligations and b) even less understanding of how to assess content against any proposed framework. The probability of inadvertent noncompliance for these groups is high, as is, as mentioned previously the chance that they will not be able to take any action to rectify any breaches they cause.

And penalties for non-compliance, inadvertent and not, need even more careful consideration when applying them to minors. Minors create a great deal and variety of media content, sometimes without realizing the implications or their potential illegality. Teenagers, for example, often fail to realize that the practice of 'sexting' is illegal for them[21]. Likewise, the seventeen-year-old author of a work of explicit fan fiction would be unlikely to realize (or, if they did realise, *care*) that, due to the access-restriction requirement on adult material, they were breaching the Act by creating the work. It would be manifestly inappropriate to subject them to large fines or criminal charges.

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20 http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~3TABLE+OF+DATA.htm/$file/3TABLE+OF+DATA.htm

21 http://www.findlaw.com.au/articles/4240/sexting-and-the-law-in-australia.aspx